United States Court of Appeals

for the Second Circuit

APPENDIX

75-2057

To be argued by
MICHAEL YOUNG

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
LARRY JULIUS GIBBS,
Appellant,

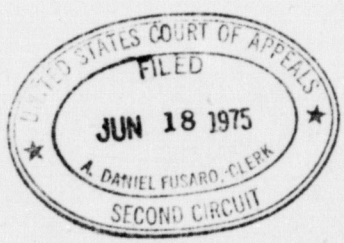
-against-

LEON J. VINCENT, Superintendent,
Appellee.

Docket No. 75-2057

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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PAGINATION AS IN ORIGINAL COPY

D. C. 110 "A" SHEET #1

73C 583 HABEAS CORPUS CLOSED BARTELS, J.

DOCKET

TITLE OF CASE

UNITED STATES OF AMERICA
ex rel. LARRY JULIUS GIBBS
vs.
LEON J. VINCENT

ATTORNEYS

For Plaintiff:

Larry Julius Gibbs # 10209 1061!
~~Box G~~
~~Drawer B~~ Pro Se
~~Stormville, N.Y. 12582~~
Wallkill, N.Y. 12589

For Defendant:

BASIS OF ACTION:

JURY TRIAL CLAIMED
ON

DATE	PLAINTIFF'S ACCOUNT	RECEIVED		DISBURSED		DATE	DEFENDANT'S ACCOUNT	RECEIVED		DISBURSED	
4-27-73	FORMA PAUPERIS	-	-								

ABSTRACT OF COSTS

TO WHOM DUE	AMOUNT	

RECEIPTS, REMARKS, ETC.

APR 27 1973

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
4-27-73	PETITION FILED FOR A WRIT OF HABEAS CORPUS.	1
4-27-73	Letter of relator herein filed dated Oct. 9, 1972 together with a reply from Clerk of Court dated Oct 13, 1972.	2 & 3
4-27-73	Letter of Julius Gibbs filed dated July 27,1972 together with a reply from Clerk of Court dated Aug.2,1972.	4 & 5
4-27-73	Letter of relator herein filed dated March 30,1972 together with a reply from Clerk of Court dated April 11,1972, etc.	6 & 7
4-27-73	Letter of relator herein filed dated Feb. 1, 1973 together with a reply from Clerk of Court, etc.	8 & 9
4-27-73	Copy of letter of Clerk of Court filed dated April 27, 1973 re acknowledgment of papers, etc.	10
6-6-73	Letter of relator herein filed dated June 2, 1973 together with a reply from Clerk of Court dated June 6, 1973, etc.	11 & 12
6-12-73	Letter of Clerk of Court returned and filed which was addressed to relator herein with words on envelope "NOT AT BOX B":	13
8-1-73	Letter of relator filed dated 7-28-73 re: change of address.	14
10-12-73	BY BARTELS, J. ORDER TO SHOW CAUSE FILED (1) The Atty., Gen., State of N.Y., to show cause before this Court by the filing of a return to the petition, why a writ of habeas corpus should not be issued, etc. (See Order)	15
10-15-73	Copy of letter of Clerk of Court filed dated Oct. 15, 1973 re enclosure of a copy of order to show cause, etc.	16
10-29-73	BY BARTEL, J. Order filed extending respondent's time to respond, etc., to November 5, 1973. (P/C mailed to attys.)	17
11-7-73	Affidavit of GENE B. MECHANIC, Assistant Atty., Gen., State of N.Y., filed in opposition.	18
11-13-73	Letter of relator herein filed dated Nov. 10,1973 , etc.	19
11-19-73	"POINTS" of relator herein filed.	20
4- 22-74	Letter of relator herein filed dated April 19, 1974 addressed to the Clerk's Office re supplemental affidavit of Gene B. Mechanic, etc.	21
8/7/74	Pltff's letter dtd 8/4/74 filed	22
10-7-74	BY BARTELS, J. MEMORANDUM-DECISION and ORDER FILED. THE PETITION for a writ of habeas corpus is DENIED. SO ORDERED. (See Memo., dated October 4, 1974.)	23 etc.,
10-10-74	NOTICE OF APPEAL FILED.	24 (co
10-11-74	BY BARTELS, J. MEMORANDUM and ORDER filed. For the reasons set forth in Court's Decision, the Court believes the appeal to be without merit and accordingly denies both applications. In addition, petitioner seeks a rehearing on the ground of "newly discovered evidence" although he does	25

73-C-583 U.S.A. ex rel. LARRY JULIUS GIBBS vs. LEON J. VINCENT

CIVIL DOCKET

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
	(Entry continued from previous page)			
10-11-74	state what that evidence is. APPLICATION DENIED.			
	SO ORDERED. (See Memo., etc.)			
3-14-75	Documents received by Clerk, U.S.C.A. Receipt filed		26	
	together with list of papers, etc.			
3-27-75	Copy of letter of Clerk of Court filed dated March		27	
	24, 1975 addressed to U.S.C.A. re documents (as listed)			
	and acknowledging same, etc.			

A TRUE COPY
ATTEST
DATED April 1, 1975
LEWIS CLERK
Marie R. Bruett
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA ex rel. LARRY JULIUS GIBBS,

Petitioner,

-against-

LEON J. VINCENT, Superintendent of Green Haven Correctional Facility,

Respondent.

----------x

73-C-583

BARTELS, D.J.

MEMORANDUM-DECISION and ORDER

Petitioner Larry Gibbs, who is presently confined at the Wallkill Correctional Facility, challenges his state court conviction by a petition for a writ of habeas corpus. He was convicted by a jury on September 17, 1968, in the Supreme Court, Queens County, of robbery in the first degree and sentenced to an indefinite term of imprisonment of ten to twenty years. His conviction was affirmed without opinion, by the Appellate Division, Second Department, 36 A.D.2d 689 (1971), and leave to appeal was denied by the Court of Appeals on April 1, 1971. He now challenges his state conviction on the grounds that he was denied due

process of law because in-court identifications by three witnesses were tainted by a previous police station "show up" and the trial court failed to hold a pretrial hearing on the question of taint as to two of the three witnesses involved. Petitioner raised these same grounds unsuccessfully on appeal.

On the evening of March 8, 1967, two armed black men entered Sam Bleck's dry cleaning establishment in Queens and proceeded to rob Bleck at gun point of approximately $500 from the cash register and from his person. In addition to Bleck, two of his employees, Margaret Perry ("Perry") and David Alston ("Alston"), were present during the holdup which lasted a little more than a minute. Pursuant to a call from Bleck, a Detective Adelson arrived about ten minutes later. After Bleck gave Detective Adelson a description of the robbers, he and the two other witnesses were shown a book containing photographs of 40 or 50 black men from which Bleck identified a photograph of petitioner. The witnesses were then taken to the police station where they were shown another book containing several hundred photographs out of which they again selected an identical photograph of petitioner. No photograph of the other robber

was ever identified. Six days later the three witnesses were asked to return to the station to make an identification. They looked through a small window into a room containing petitioner, his mother, his father, and a white police officer, and each identified petitioner as one of the robbers.

A pretrial hearing was held on petitioner's motion to suppress any in-court identification at trial, at which time testimony was taken on Bleck's identification of petitioner. The Court ruled at that time that the procedure did not violate due process and the motion to suppress was denied. No testimony was taken on the identification of petitioner by Perry and Alston at the hearing and the Court apparently did not rule on their identifications. At the trial all three witnesses testified that petitioner was one of the robbers and no objection was raised to the identification by Perry and Alston.

Petitioner's claim of lack of due process focuses upon the "show-up" identification procedure at the police station. The "show-up" occurred prior to the Supreme Court's rulings in Wade v. United States, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), and is thus governed by the standard set in Stovall v. Denno, 388 U.S.

293 (1967), of due process in the "totality of the circumstances" surrounding the identification. 388 U.S. at 302. Under this rule the Court must decide whether "the confrontation conducted ... was so unnecessarily suggestive and conducive to irreparable mistaken identification that [petitioner] was denied due process of law." 388 U.S. at 301-302.

While the use of the photographs in this case was plainly not impermissibly suggestive, Simmons v. United States, 390 U.S. 377 (1968), petitioner contends that the admittedly suggestive station h use "show-up" so increased the risk of mis-identification at trial that due process was violated. Factors to be considered in evaluating the likelihood of irreparable mistaken identification include

> "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Neil v. Biggers, 409 U.S. 188, 199 (1972).

Although the witnesses observed the criminal for only a little more than a minute at the time of the crime, courts have recognized that a brief observation by the victim

of a crime is often more reliable than a longer view by a mere bystander. In United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir.), cert. denied, 400 U.S. 908 (1972), the Court found a 20 or 30 second view by the victim of an assault sufficient to uphold an in-court identification in spite of a "show-up" an hour after the crime. Certainly Bleck's observation of the robbers for over a minute was enough to imprint their image in his mind, since he was the immediate victim of the robbery and his attention was focused directly upon the robbers for the entire period. See also United States ex rel. John v. Casscles, 489 F.2d 20, 25 (2d Cir. 1973); United States ex rel. Anderson v. Mancusi, 413 F.2d 1012, 1013 (2d Cir. 1969).

Bleck's first identification of the petitioner from the photographs was made only a few minutes after the robbery and with a high degree of certainty. He indicated to the detective that he did not see the second robber in the photographs but he was sure of his selection of petitioner's photograph. In addition, his later identifications of petitioner at the "show-up" and at trial were made without hesitation. The show-up occurred only six days after the crime and in view of the certainty with which he was able

to identify petitioner's photograph on the day of the crime, it is highly probable that petitioner's image was fixed in his mind and had not faded at the time of the show-up. See United States ex rel. Bisordi v. LaVallee, 461 F.2d 1020, 1024 (2d Cir. 1972); United States ex rel. Robinson v. Vincent, 371 F.Supp. 409 (S.D.N.Y. 1974).

The weakest point of Bleck's identification is his description of the robbers at the time of the crime. Bleck stated that petitioner was the shorter of the two robbers and described him to Detective Adelson as being 25 years old, 5' 9" tall, and weighing about 185 pounds. In fact, at the time of the crime petitioner was 17 years old and weighed about 140 pounds, although he was about 5' 9" tall. It should be recognized that descriptions given by victims of crimes are not likely to be accurate in every respect especially when the victim is confronted with a pistol. We do not find that these inaccuracies outweigh Bleck's certain identification of petitioner from the photographs immediately after the crime. See United States ex rel. Lucas v. Regan, Slip Op. 5367 (2d Cir., September 3, 1974); United States ex rel. Bisordi v. LaVallee, supra, 461 F.2d at 1025.

Bleck's identification is further bolstered by Perry's and Alston's identifications of petitioner at trial. Their identification was based on the same procedure as was Bleck's, although they did not offer any verbal description of the robbers at the scene of the crime as Bleck did. Petitioner challenges their in-court identifications on the ground that no pretrial hearing was held to determine if their identifications should be suppressed. However, petitioner in moving for a pretrial hearing to suppress his identification, mentioned only the identification by the complaining witness, Bleck. At the time of the hearing he made no objection to the failure to produce Alston or Perry, and at least prior to Gilbert v. California, supra, the state was under no obligation to produce them at a pretrial hearing. In addition, it was brought out at the suppression hearing that Perry and Alston also identified petitioner in the same manner as did Bleck. Thus it is obvious that petitioner's counsel deliberately chose to waive their production at the hearing since the circumstances of their identification were the same as Bleck's. In view of this and his further failure to object to their identifications at trial, we find that any objection to the failure to con-

duct a pretrial hearing has been waived and, in any event, there was no violation of due process.

We likewise find no constitutional defect in the trial court's refusal to permit petitioner's fraternal twin brother to sit at the counsel table during the pretrial suppression hearing and during the trial, in view of the certainty of all three witnesses' identification of petitioner both before and during the trial.

It should be noted in this connection that the determination of the trial judge as to these matters is entitled to great weight. United States ex rel. Phipps v. Follette, supra, 428 F.2d at 915-916.

The petition for a writ of habeas corpus is hereby denied. SO ORDERED.

Dated: Brooklyn, N.Y.,
October 4, 1974.

United States District Judge

At a Criminal Term, Part I, of the Supreme Court, State of New York, held in and for the County of Queens, at 125-01 Queens Boulevard, Kew Gardens, New York, on the [illegible] day of December, 1967.

PRESENT:

HON. EDWARD THOMPSON
Justice.

- X

THE PEOPLE OF THE STATE OF NEW YORK

against

LARRY JULIUS GIBBS,

Defendant.

ORDER TO SHOW CAUSE.

Ind # 587/67

- -X

Upon the annexed affidavit of ALLAN STURIM, ESQ., duly sworn to the 12th day of December, 1967, and upon the indictment herein, and upon all of the proceedings heretofore had herein;

LET the District Attorney of the County of Queens show cause before this Court, at a Special Term, Part I thereof, to be held in the Courthouse located at 125-01 Queens Boulevard, Kew Gardens, New York, on the [illegible] day of December, 1967, at 9:30 o'clock in the forenoon of said day or as soon thereafter ans counsel can be heard; why an order should not be made granting the defendant herein an order suppressing the identification made of said defendant and dismissing the indictment against him; or in the alternative, setting the within matter down for a hearing as to whether the identification made of the defendant herein was in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States; together with such other and further relief as to this Court may seem just and proper; and sufficient cause appearing therefor,

LET service of a copy of this order, with a copy

of the affidavit upon which it is granted, upon the District Attorney of the County of Queens, on or before the day of December, 1967, be deemed due and sufficient service.

J. Thompson
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK:
COUNTY OF QUEENS:

- X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

LARRY JULIUS GIBBS

Defendant.

- -X

State of New York:)
County of Queens:) ss:

ALLAN STURIM, being duly sworn, deposes and says:

1. That he is the attorney retained to represent the defendant above named and as such is fully familiar with all the pleadings and proceedings heretofore had herein.

2. Defendant has been indicted by the Grand Jury of Queens County for the crime of robbery in the 1st degree while armed. Deponent's investigation of the matter reveals the following: That some six or seven days after the alleged commission of a robbery wherein a dry cleaning establishment located in the County of Queens had been held up by two male negroes, detectives assigned to the case brought the complaining witness to the station house where he spent considerable time browsing through rogues gallery photographs before selecting one or two photographs from the files, one of which, upon information and belief was that of the defendant Larry Gibbs.

3. Thereafter, detectives came to the defendant's home some six or seven days after the alleged commission of the robbery herein, and after gaining access to the defendant's home attempted to place under arrest the defendant's brother, Gary Gibbs. When the defendant's brother protested that he was not Larry Gibbs but his twin brother, Gary, the officers persisted in their efforts to take him into custody until such time as the defendant Larry Gibbs actually came into

the apartment. Upon the defendant identifying himself to them as Larry Gibbs, he was then taken into custody and together with his father, mother and younger sister were brought to the station house where the defendant together with his mother, father and sister were placed in a room which contained a one-way window to permit the complaining witness to observe the occupants. The only person present in the room in addition to the defendant, was his mother, father and sister. No effort whatever was made on the part of the detectives to attempt to have persons of similar general appearance or description present at the same time, nor did they make any effort to have the defendant's twin brother present in a line-up together with the defendant for the purpose of ascertaining whether the complaining witness could recognize or distinguish between the two. Special care and attention should have been taken by the officers in conducting an identification confrontation where the chances of a mistaken identification was so apparant that even these arresting officers first attempted to take into custody the wrong individual. This after the officers made the mistake under circumstances where there was no great fear or emotional stress as the complainant was subjected to, and while in all probability, the officers still had the same photograph in their possession that had been identified as the defendant by the complaining witness when they went to the apartment of the defendant. Certainly, elemental fairness and basic due process of law required that when the officers arranged for the complaining witness to view the defendant it should not have been done under circumstances designed to lead to but one possible conclusion, to wit, that the defendant, Larry Gibbs, was the only individual who would have fit the photograph or the description given by the

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complainant.

4. It is respectfully submitted that the instant application for an order suppressing the identification made herein or in the alternative, directing that a hearing be ordered, is not to be confused with a claim under the Stovall and Wade decisions that the defendant did not have the right to counsel. The relief sought herein, is predicated upon the fact that identification confrontation was so suggestive and conducive to mistake, that it infringed on the defendant's right to due process of law, which has always been recognized as a ground of attack independent of any right to counsel claim. Palmer v. Fayton, 359 F2nd, 199.

5. That no previous application has been made for the relief herein requested, and this matter is brought on by order to show cause by virtue of the fact that this matter is now pending in the Trial Term, Part 2 of this Court. The reason that this motion was not previously made, is because deponent has just become aware of case law which permits the issue of due process of law, when applied to the issue of identification, to be considered prior to trial.

WHEREFORE, your deponent respectfully prays that an order be made suppressing the identification made of this defendant and dismissing the indictment against him, or in the alternative, that a hearing be ordered to inquire into whether the defendant's right to due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States was abridged by the manner in which the defendant was identified; together with such other and further relief as to this Court may seem just and proper.

Sworn to before me this
12th day of December, 1967.

ALLAN STURIM

Notary Public)

ROBERT [illegible] ARROW
Notary Public, State of New York
No. 41-37[illegible] Queens County
Term Expires March 30, 1968

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CERTIFICATE OF SERVICE

June 18, 1975

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Michael D. Young